

Fighting the Virus and the Rule of Law – A Country Report on Norway

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Governments across Europe are quick to limit personal freedoms in the name of fighting the pandemic. The case of Norway, however, reveals how the process of adopting these measures can compromise democratic discourse and procedure. The main rule of law challenges we have seen here are an overreach of the authorities of their legal powers, a lack of transparency and exclusion of the public from public decision-making and battle over jurisdiction to regulate between the central government and local authorities. In the end, it is not just our health, but the rule of law that is under threat.

The first legislative action taken in Norway was a regulation passed March 13 by the government under the Disease Prevention Act 1994 on quarantine, isolation of infected persons, and a prohibition against staying in second homes outside of the municipality of one's place of residence. Schools and kindergartens were closed, meetings and assemblies prohibited and many services like hairdressers, dentists and gyms temporary prohibited. There is no curfew, but people are encouraged to avoid using public transport, not to go to work unless absolutely necessary and not to admit people into their homes. Later there has been a flux of measures modifying normal procedures in public administration and public services to open for virtual communication, for instance within the courts and in all levels of education. There have also been enormous economic support packages to affected businesses and workers.

Cursory Review of the Proportionality of Measures

One of the most controversial restrictions is the prohibition against staying in a second home if this is in a different municipality from the permanent place of residence. This must be seen in the light of the Norwegian custom of owning a “hytte”, or a cabin in the mountains or by the sea to spend the holidays, and the importance this has to many people's way of life. The prohibition was enacted in response to demands from sparsely inhabited rural communities to prevent an influx of city dwellers who could potentially carry the virus. (Similar conflicts evidently arise also [in other countries](#)).

Despite the effects of the restrictive shut-down measures on the society and the economy, no-one initially raised the question of the constitutionality of this prohibition as a restriction on the freedom of movement, on the right to family life and on the use of property. Only after 10 days, on March 23, the director of the National Institution on Human Rights in Norway raised these concerns in the daily newspaper Aftenposten. The foremost problem with this prohibition was a complete lack of evidence that the government had reviewed the necessity and proportionality of the

measures, before enacting the regulation. The argument of the government was that the restriction was necessary in order to protect the health-services in the districts from being overburdened by an increase in the normal population. No account was taken of the fact that many people have their cabins only a couple of hours drive from their permanent homes, or that the purpose of protection of the capacity of the health services could be reached by less restrictive means. The government has admitted that the decision was taken as an executive decision without any formal preparation or review of alternative and less restrictive courses of action but has refused to withdraw the restriction or modify it.

A Secret Plan of the Government?

The most concerning development as regards the rule of law came when the government on March 19 announced that it had been secretly drafting an Emergency Powers Bill. The government prepared this act without the usual input by the public, and without a public hearing of affected institutions and interests. The government held secret meetings where they reached an agreement with the leaders of the opposition to push the bill through parliament with only the pretense of a debate. The [Bill](#) proposed to give the Government powers to pass legislation without involving the Parliament, and to derogate from existing laws, when necessary to “limit the disturbance of the normal functioning of society” and “to mitigate negative effects for the population, businesses, the public sector or society at large”.

One problem was the mechanism of parliamentary control. A law enacted by the government could be repealed by a third of the MPs, but this presupposed that a meeting of Parliament could be held, a condition that would often be difficult to fulfil in the situations where the government exercises their power. The move prompted a storm of protests from leading [legal scholars](#), the [bar association](#) and the [association of judges](#). As a result, the parliament asked for expert input, and radically rewrote the proposal in the parliamentary process before passing it. The law now states that the government may not limit the jurisdiction of the courts. A new mechanism of parliamentary control was designed. There is no necessity for the Parliament to meet in a formal session. If one third of the MPs notify the parliament (for example by email), the government immediately must repeal its regulation.

The government proposal was obviously a work of haste, severely lacking in quality. There was no explanation or analysis of why such an act was necessary, and no acknowledgement of the serious compromises it imposed on the separation of powers, democratic safeguards and the rule of law. The most troubling aspect of the proposal, however, was the way that its development demonstrated that the government was prepared to disregard normal democratic procedures for the enactment of legislation.

Uncoordinated Local Measures

While the government developed and enacted central rules and measures, many local governments enacted their own rules based on powers in the Disease

Prevention Act, which empowers local government to enact rules prohibiting assemblies and meetings, to shut down businesses, to regulate and shut down transport, to isolate people within limited geographical areas and to order the disinfection or destruction of affected goods, property, and localities. Many of these powers have been [used by more than 120](#) of the 356 municipalities in Norway

Based on these powers, local governments have enacted prohibitions on assemblies and gatherings, some going as far as prohibiting events in private homes involving more than one household. Some local authorities restrict the use of handshakes and embraces, and demand that parents and other custodians regularly instruct individuals under their care in the rules and procedures of personal hygiene. Breaching both national and local regulations is punishable by fines or even prison sentences of up to two years.

The underlying rationale of the act is that efforts to combat infectious diseases must start locally, and that a combination of local and central measures is necessary. With such a wide-scale crisis as COVID-19, this approach, however, in many cases leads to problems due to lack of coordination. Central and local authorities take different views on what measures are necessary, and at what level one should seek to suppress the spreading of the disease. Local travelling restrictions, restricting travel from the outside into some municipalities cause great problems for businesses, workers and the performing of essential services. In one case, the regional district attorney had to go into quarantine for 14 days after returning to his hometown Tromsø from arguing a case in the Supreme Court in Oslo.

Such prohibitions in some municipalities against the entry of people from other parts of the country, or the requirement that people entering from the outside of the municipality are placed in quarantine for 14 days are controversial, and the central authorities have stated that they are unnecessary as a supplement to the national measures. The municipalities that enact such restrictions are stretching their authority and are arguably acting outside the scope of the law. Nevertheless, the municipalities refuse to repeal the restrictions, and the central government has not used its power to strike them down.

Since such regulations are arguably outside the scope of the powers under the act the central prosecuting authority has stated that they will not be enforced by the police, which is under the power of the central government, and not the local governments. The fact that the central government has encouraged local governments to repeal such restrictions, without declaring them illegal puts the population in a state of legal uncertainty, and by this, neither the central government, nor the local governments live up to the basic requirements of the rule of law. In a way the situation within Norway mirrors the lack of coordination between countries at the international level that has been [called for by the WHO](#).

A Lose-Lose Situation

Many of these measures cast doubt on the willingness and ability of our authorities to uphold the rule of law and the basic requirements of the constitution in the

current situation. At the same time, people are flocking behind their leaders, and leaders everywhere are gaining in support on the opinion polls. This is a dangerous combination for the rule of law. It is understandable that both governments and the population demand effect measures to contain the spread of the disease and to protect public health. It is, however, not acceptable to stretch, bend and even break rules to this end. In the long run this may lead to a disrespect for law, which may also affect the effectiveness of necessary measures to fight the virus, and maybe force the government to implement forceful means to ensure compliance.

Conclusion

When society is in a state of crisis or emergency, the rule of law often falls victim to repressive measures and is often undermined even by the judiciary. This was the experience of the relatively stable judicial institutions of [Chile](#) and [South Africa](#), and of the British courts during the “Troubles” of Northern Ireland. Judges [often accept limits](#) to their jurisdiction, and often cooperate in giving effect to authoritarian measures. The dismantling of our legal and democratic institutions is not inevitable but is often a regrettable result. There is an inherent danger in the combination of a government needing to show effective leadership and a large amount of the population demanding it, whether for the sake of public health, of traditional or national values, or to fight against a real or perceived enemy. Bypassing our established institutions may seem necessary but is [not even always effective](#). When decisions are taken by a closed group, with the public shut out, the choices that are made are often not optimal. The losers are both the rule of law and rational and effective decision-making to overcome the difficulties that society is facing.

